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Nos. 04-805 & 04-814

IN THE

Supreme Court of the United States

TEXACO, INC.,

Petitioner,

v.

FOUAD N. DAGHER, *et al.*,

Respondents.

SHELL OIL COMPANY,

Petitioner,

v.

FOUAD N. DAGHER, *et al.*,

Respondents.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF FOR *AMICI CURIAE* VISA U.S.A. INC., THE COCA-COLA COMPANY AND MICROSOFT CORPORATION IN SUPPORT OF PETITIONERS SHELL OIL COMPANY AND TEXACO, INC.

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Pursuant to Rule 37.2(b) of the Rules of the Supreme Court of the United States, Visa U.S.A. Inc. ("Visa"), The Coca-Cola Company ("Coca-Cola") and Microsoft Corporation ("Microsoft") respectfully move this Court for leave to file the brief submitted herewith, as *amici curiae* in support of the Petitions for Writ of *Certiorari* filed by Shell Oil Company and Texaco, Inc.

Petitioners have given a blanket consent to the filing of any *amicus* briefs; respondents refused to consent to the filing of this brief.

As set forth in the accompanying brief, *amici* Visa, Coca-Cola and Microsoft seek to bring to the attention of this Court the importance of the legal principles raised in this case to the establishment and operation of joint ventures, and the significant risks posed by the Ninth Circuit's decision—beyond the immediate facts of this case—to a broad range of ventures operating across the American economy. The present petitions represent an important, and much-needed, opportunity for this Court to reconcile the vastly divergent approaches to joint venture analysis that currently exist among the lower courts. Without such clarification, firms which participate in joint ventures will continue to be exposed to the danger of condemnation for single-firm conduct that should not be actionable at all under *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). By raising the specter of *per se* liability for internal decisions that are fundamental to the very purpose for which the joint venture involved in this case was formed, the majority has created a demonstrably mistaken and dangerously threatening precedent for all joint ventures.

Accordingly, *amici* respectfully request leave to file the brief submitted herewith.

Respectfully Submitted,

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This brief is respectfully submitted on behalf of Visa U.S.A. Inc., the Coca-Cola Company and Microsoft Corporation, as *amici curiae* in support of petitioners, Texaco, Inc. and Shell Oil Company, who have separately filed petitions for writs of certiorari from the judgment of the United States Court of Appeals for the Ninth Circuit in this case.[1]

INTEREST OF *AMICI*

Amici have a particular—but by no means unique—interest in this case.[2] Like all businesses, *amici* seek predictability and certainty in the legal rules under which they operate. However, the Ninth Circuit's decision in this case *compounds* the uncertainty that businesses face when planning, entering into and operating joint ventures. That uncertainty does significant harm to this form of business organization and, as a consequence, to the beneficial competitive efficiencies they create.

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[1] This brief was prepared in its entirety by *amici curiae* and their counsel. No monetary contribution toward the preparation or submission of this brief was made by any person other than *amici curiae*, their members, and their counsel. Petitioners have filed with the Court a blanket consent to the filing of *amicus* briefs; respondents have refused their consent. Accordingly, the requisite motion for leave under Rule 37 of the Rules of United States Supreme Court is filed with this brief.

[2] Visa U.S.A. Inc. ("Visa") is one of the world's largest joint ventures and a participant in an international payment system which generates more than $3 trillion in annual card sales volume. Visa has been a party to some of the most significant antitrust cases relating to joint ventures over the past two decades. *See Nat'l Bancard Corp. v. Visa U.S.A. Inc.*, 779 F.2d 592 (11th Cir. 1986); *SCFC ILC, Inc. v. Visa U.S.A. Inc.*, 36 F.3d 958 (10th Cir. 1994); and *United States v. Visa U.S.A. Inc.*, 163 F. Supp. 2d 322 (S.D.N.Y. 2001), *modified in part on other grounds*, 183 F. Supp. 2d 613 (S.D.N.Y.), *aff'd*, 344 F.3d 229 (2d Cir. 2003), *cert. denied*, 125 S.Ct. 45 (October 4, 2004). The Coca-Cola Company and Microsoft Corporation participate in numerous joint ventures around the world and desire to plan and enter into future ventures with a clear understanding of the U.S. antitrust laws that will apply to such arrangements.

The consequences of the Ninth Circuit's seriously flawed decision for petitioners, *amici* and all businesses planning or operating joint ventures are significant and justify review by this Court. This case has revealed a gulf between the principal antitrust regulators and the Ninth Circuit in their respective approaches to fully integrated marketing and distribution joint ventures. That the former saw no basis for liability, whereas the latter required the petitioners to disprove the unreasonableness of the venture, leaves businesses—and the professionals who advise them—in a quandary. *Amici*—and all businesses—require a restoration of common sense and predictable rules to the analysis of joint ventures under the antitrust laws. Accordingly, *amici* support the petitions for writ of certiorari.

SUMMARY OF ARGUMENT

1. The present petitions represent an important, and much-needed, opportunity for this Court to reconcile the vastly divergent approaches to joint venture analysis that currently exist among the lower courts. Without such clarification, firms which participate in joint ventures will be exposed to increased danger of condemnation, on a *per se* basis no less, for single-firm conduct that should not even be actionable at all under *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

This Court has recognized the significant procompetitive benefits that joint ventures can generate. *See, e.g., Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979); *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984); *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985). By raising the specter of *per se* liability for internal decisions that are fundamental to

the very purpose for which the joint venture involved in this case was formed, the Ninth Circuit has created a demonstrably mistaken and dangerously threatening precedent for all joint ventures, thereby materially undermining their utility as a form of business enterprise.

2. The fundamental question at the heart of this case is whether a fully integrated entity—one that involves a legitimate sharing of risk and reward—should be subject to potential liability under Section 1 of the Sherman Act, 15 U.S.C. § 1, for doing those things it was created to do. The principal regulators charged with enforcing the antitrust laws determined that the parties' joint venture was a single entity, and that its creation should be viewed as a complete merger of all of Texaco's and Shell's downstream operations. Under *Copperweld*, that should be the end of this case. Yet, the Ninth Circuit not only ignored those regulatory determinations but, effectively, treated the joint venture as pretextual by holding its pricing decisions subject to *per se* liability. The result of this approach is an untenable situation where every decision by a joint venture to purchase goods risks being branded a group boycott and every sale a price-fixing conspiracy. *Compare* VII P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 1477, 310 (2d ed. 2003). Imposing on parties the risk of crippling liability for doing no more than what has been approved by the regulators is not simply misguided, but dangerous to American competition policy, and ought to be examined by this Court.

For the reasons cogently explained by Judge Fernandez in dissent, no liability or even the *potential* for liability should attach here because "nothing more radical is afoot than the fact that an entity, which now owns all of the production, transportation, research, storage, sales and distribution facilities for engaging in the gasoline business also prices its own products."

Pet. App. 34a.[3] An integrated joint venture, like any business, must be able to do those things necessary to carry out its essential operations. In the case of a distribution and marketing firm, that obviously includes pricing the products it sells.

3. By denying the joint venture at issue the ability to price its goods for sale, the Ninth Circuit does more than interfere with its operation: it attacks its very existence. Characterizing the venture's setting of a price for the sale of its own gasoline as *per se* illegal is, in reality, questioning whether the joint venture should be permitted to engage in the marketing of gasoline in the first place. Such a question may be raised, *but not by means of a price-fixing claim alleging a horizontal conspiracy by the venture's members*. Rather, an attack on the creation or scope of a joint venture (were one to be brought), needs to proceed, if at all, under Section 7 of the Clayton Act, 15 U.S.C. § 18, subject to its requirements and burdens of proof, and taking into account the venture's purpose as well as its potential effects on competition. That is the framework under which the regulators reviewed the formation of the venture here and it is the way in which a case brought after the fact—either by the government or private plaintiffs—to challenge the permissible activities carried on by the venture needs to proceed.

In this case, the Federal Trade Commission ("FTC") and state Attorneys General resolved the issue of the joint venture's legality and scope when they approved the establishment and permissible functional operations of the venture in the first place. That decision purportedly is not challenged by the respondents. But once the matter of existence and

[3] *Amici* have filed this same brief in connection with the separately filed petitions of Texaco and Shell (Docket Nos. 04-805 and 04-814). For convenience, references are to the appendix filed with Shell's petition (04-814).

scope of operations is answered, there is no Section 1 question to be considered where the only issue is the right of the venture to set the prices for the things it has been allowed to make and sell. It is no more appropriate to ask whether Equilon should be allowed to decide what to charge for Texaco and Shell gasoline than to ask whether Sears can put a price tag on its dishwashers, or a law firm can decide what to charge for its attorneys' services.

4. The consequence of the Ninth Circuit's unaccountably misdirected decision is to undermine antitrust policy towards joint ventures. Foundational questions about whether the joint venture's activities would, on balance, result in a lessening of competition in this market were never addressed. Rather, respondents sought, and the majority applied, a completely inappropriate *per se* price-fixing analysis. The result is that such ventures are placed at a serious competitive disadvantage as a form of industrial organization. In light of the unique role which the judicial branch (and, perforce, this Court) plays in articulating American competition policy, the Court should grant these petitions to set antitrust analysis of joint ventures back on a sound footing—one which takes proper account of the procompetitive benefits that joint ventures can generate and properly balances benefits and harms by considering actual market effects.

REASONS FOR GRANTING THE WRIT

A. Joint Ventures Are Of Great Importance To American Commerce And Should Be Fostered Under The Antitrust Laws.

Joint ventures are ubiquitous and operate in virtually every sector of the economy. They are a vital part of our economic system and it is critically important to protect their utility as a form of industrial organization. As one commentator has observed, "[f]irms in nearly every American industry are now considering alliances, joint ventures, mergers, and other collaborative arrangements with their competitors. . . . Indeed, . . . such collaborations are becoming the dominant form of economic integration in the world economy." Thomas A. Piraino, Jr., *A Proposed Antitrust Approach To Collaborations Among Competitors*, 86 Iowa L. Rev. 1137, 1139 (2001) (internal quotation omitted). *Amicus* Visa is itself, perhaps, the most well-known example of a successful joint venture, though a review of the business press reveals innumerable others formed on a daily basis. For example, in the last 30 days alone, new joint ventures have been announced by Honda and British American Tobacco; Cisco and EMC; IBM and China Great Wall Computer Group; Fairmont Hotels & Resorts, Kingdom Hotels International and Bank of Scotland; Bristol-Myers Squibb and Gilead Sciences; SBC Communications and 2Wire; and many others. It is difficult to quantify precisely the scope of this activity, but some estimates suggest that the number of joint ventures and strategic alliances are growing annually by 25 to 35 percent, with a current rate of formation of approximately 10,000 per year. *See* Peter Pekar, Jr. and Mark S. Margulis, *Equity Alliances Take Center Stage*, 14:2 Bus. Strategy Rev. 50, 55 (2003).

Joint ventures, which can generate "cost reductions [that] tend to yield higher output and lower prices . . . ," XI H. Hovenkamp, *Antitrust Law* ¶1907c, 221 (1998), have been recognized by this Court in leading cases such as *Copperweld Corp.*, 467 U.S. at 768 ("[M]ergers, joint ventures, and various vertical agreements, hold the promise of increasing a firm's efficiency and enabling it to compete more effectively. Accordingly, formation of such combinations are judged under a rule of reason, an inquiry into market power and market structure designed to assess the combination's actual effect."); and *NCAA*, 468 U.S. at 103 ("a joint selling arrangement may be so efficient that it will increase sellers' aggregate output and thus be procompetitive."). They also have been the subject of extensive scholarship. *See, e.g.*, Thomas A. Piraino, Jr., *Reconciling Competition and Cooperation: A New Antitrust Standard for Joint Ventures*, 35 Wm. & Mary L. Rev. 871, 876 (1994) ("A joint venture may allow its partners to achieve economic efficiencies that they could not have accomplished on their own. In the long run, such efficiencies may outweigh any restriction of competition caused by a joint venture."); *see also* Gregory J. Werden, *Antitrust Analysis of Joint Ventures: An Overview*, 66 Antitrust L.J. 701, 702 (1998) ("Joint ventures are an important and distinct category for antitrust analysis because of their potential to bring about an efficiency-enhancing integration of economic activity."); and XIII H. Hovenkamp, *Antitrust Law* ¶2121b, 117 (1999).

The petitioners in this case believed that a joint venture—as opposed to some other form of business organization—was the most effective and efficient means for carrying out a combined business. "[A]ntitrust policy should not bias the selection of a form of business organization by entrepreneurs and investors." H. Chang, D. Evans and R. Schmalensee, *Some*

Economic Principles For Guiding Antitrust Policy Towards Joint Ventures, 1998 Colum. Bus. L. Rev. 223, 262 (1998). But that is precisely the consequence of the Ninth Circuit's decision. Despite possible increased transaction costs and decreased flexibility, parties might decide to forego their collaboration entirely or might choose to merge instead of forming a joint venture, simply to avoid the risk of liability resulting from an improvident analytic approach such as that offered by the Court of Appeals in this case. That is inefficient, and makes no sense. There is no reason to distinguish Equilon—an integrated joint venture carrying out all aspects of the downstream gasoline business in competition with other sellers—from other competitors based simply on its genesis. *See Chicago Prof. Sports Ltd. P'ship v. NBA*, 95 F.3d 593, 598 (7th Cir. 1996); *Arizona v. Maricopa County Med. Society*, 457 U.S. 332, 356 (1982). But the Ninth Circuit has done just that, by creating a liability trap that is able to snap shut when the venture does no more than what it was formed to do.

Incorrect antitrust analysis, and the resulting uncertainty which it fosters, poses serious risks to vigorous competition. Particularly in the area of joint ventures, where the law has struggled to encourage efficient business organizations amidst its inherent distrust of horizontal arrangements among competitors, there is a compelling need for certain, predictable and efficient rules. Because the Ninth Circuit's decision imposes "the severe sting of antitrust liability," Pet. App. 34a (Fernandez J., dissenting), on legitimate joint ventures doing precisely what they were created to do, the risks to efficient competition by joint ventures will be realized if the Ninth Circuit's decision stands.

Even before the decision in this case, it had been observed that, because "courts and enforcement agencies

have been unable to agree upon a uniform method of balancing the procompetitive and anticompetitive aspects of particular collaborations[,] . . . American firms have been needlessly deterred from entering into cooperative arrangements that could enhance their efficiency." Piraino, 86 Iowa L. Rev. at 1141. Without intervention from this Court clarifying the circumstances under which firms are at risk in these cooperative ventures, it will be exceedingly difficult for responsible business counselors to advise prospective joint venturers regarding the legality of their proposed activities. The natural—but competitively unhappy—outcome will be to deter needlessly the formation of ventures which offer the potential for significant procompetitive benefits. Avoiding that untoward result is a worthwhile use of this Court's certiorari jurisdiction.

B. Certiorari Should Be Granted To Affirm That Section 1 Has No Application To A Fully Integrated Joint Venture Carrying On The Business For Which It Was Created.

Precisely because of their ubiquity and potential for producing significant consumer welfare benefits, it is critical that courts develop and employ appropriate rules for dealing with joint ventures. As then FTC Chairman Timothy Muris observed: "No analytical exercise is more important to U.S. competition policy than defining the bounds of acceptable cooperation between direct rivals." *In re Polygram Holding, Inc.*, No. 9298, 2003 FTC LEXIS 120, at *12 (F.T.C. July 24, 2003). Yet, despite the acknowledged importance of this "exercise," the Ninth Circuit in this case simply treated the venture's ordinary business decisions as if they were the product of a naked restraint. In doing so, it circumscribed entirely the "acceptable cooperation between direct rivals" in a distribution

and marketing joint venture, thereby materially undermining this form of business organization. If this venture, which fully integrated all aspects of Texaco's and Shell's downstream operations, cannot price for sale its own products, what marketing venture could? And what does it mean to say that the petitioners in this case were entitled to engage in "marketing"?

The Ninth Circuit's decision in this case is demonstrably incorrect. But *amici* urge review for a more fundamental reason. Certiorari is required because the approach taken by the Ninth Circuit is not merely mistaken, but reflects a lack of appreciation of how to address joint venture issues—a fact which strongly suggests that the lower courts lack sufficient guidance from this Court in dealing with joint venture cases generally.

This is not a price-fixing case. It is a case about whether the marketing of petroleum products should be allowed to be part of the Equilon joint venture. To reduce costs and maximize efficiencies, Equilon was created by Shell and Texaco to carry out all aspects of their downstream gasoline business. Equilon (along with Motiva, which is no longer a part of this case, *see* Pet. App. 9a-11a) was formed from virtually all of the companies' downstream assets. Pet. App. 3a n.3. In contrast with more limited joint ventures set up, for example, only to conduct research, engage in marketing or produce goods, Equilon was formed to own and operate *all aspects of the business*, from the refineries to the stations to the gas pumps. As a result of the formation of their joint venture Texaco and Shell no longer compete in downstream operations in the United States. *Id.* at 4a.

Once formed, a fully integrated entity should be treated no differently than a single firm when carrying out the functions

contemplated (and approved) at its creation.[4] The joint venture here effectively is a complete merger of the companies' downstream operations, and should be treated as such, to wit: as a single firm, outside the ambit of Section 1. Indeed, as the FTC later explained in a case involving a subsequent merger by Texaco: "For antitrust purposes, the Commission evaluated the formation of the Alliance [Equilon and Motiva] as if it were a complete merger of the downstream operations of Texaco and Shell. . . . In all subsequent oil merger investigations undertaken by the Commission, we have considered Texaco and Shell to be a single entity when evaluating downstream market concentration." *In The Matter of Chevron Corporation, a corporation, and Texaco Inc., a corporation,* Docket No. C-4023 (January 2, 2002), Statement of Commissioners Anthony and Thompson. Moreover, the Department of Justice

[4] As this Court observed in *Maricopa County Med. Society*, 457 U.S. at 356, a joint venture "in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit . . . [can be] regarded as a single firm competing with other sellers in the market." Other courts and commentators have expressed similar views. *See Chicago Prof. Sports Ltd. P'ship*, 95 F.3d at 600 (observing that the NBA may be "best understood as one firm when selling broadcast rights to a network in combination with a thousand other producers of entertainment, but is best understood as a joint venture when curtailing competition for players who have few market opportunities"); *see also City of Mt. Pleasant, Iowa v. Assoc. Elec. Coop.*, 838 F.2d 268, 276 (8th Cir. 1988) (holding that Section 1 does not apply to the pricing decisions of an electric cooperative because "the cooperative organization is a single enterprise pursing a common goal"); *see also* VII P. Areeda, *Antitrust Law* ¶ 1478c, 355 (1986) ("In general, once a venture is judged to have been lawful at its inception and currently, its decisions should be regarded as those of a single entity rather than the parents' daily conspiracy on every purchase-sale-hiring-licensing choice.") (Professor Hovenkamp employs a slightly different articulation of this principle in his reissue of the classic Areeda treatise. *See* VII P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 1478c, 325 (2d ed. 2003).)

and the FTC cite in their joint *Antitrust Guidelines for Collaborations Among Competitors*, 4 Trade Reg. Rep. (CCH) ¶ 13,161 (2000), this very combination as an example of a fully integrated venture *not to be considered a joint venture at all*, but rather a merger subject to the Horizontal Merger Guidelines. *See Example 1.*[5]

Like a single entity, a joint venture engaged in the distribution and marketing of products must be free to do internally those things which are necessary to compete. "[A]ntitrust law permits, indeed encourages, cooperation inside a business organization the better to facilitate competition between that organization and other producers." *Chicago Prof. Sports Ltd. P'ship*, 95 F.3d at 598. That includes pricing its products. Such a joint venture, like any business, needs to set the prices of the things it sells. Doing so is not even remotely illegal *per se*. In this context, it is not even an appropriate subject of an antitrust inquiry at all. *See Copperweld Corp.*, 467 U.S. 752; *see also*, XI H. Hovenkamp, *Antitrust Law* ¶1906d, 214 (1998). ("[M]any forms of joint marketing require an agreement about the price to be charged."); *see also, id.*, ¶1908e at 237 ("[A]greements about price are often essential to the administration of certain joint ventures, particularly in distribution."). As Judge Fernandez put it in his dissent: "What could be more integral to the running of a business than setting a price for its goods and services?"[6] Pet.

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[5] Texaco and Shell continued to compete in the upstream business—oil and gas exploration—in the United States and in both upstream and downstream operations elsewhere in the world. Pet. App. 4a & n.1.

[6] In response to the dissent's sound conclusion that there is nothing radical about an entity pricing its own goods for sale, the Ninth Circuit majority suggests that Texaco and Shell may in fact have "agreed in advance to charge the same price for their two distinct gasoline brands as an initial operating requirement of the alliance," and that that was not a decision made by a "single economic entity." Pet. App. 19a, n.11. Even if that were true,

App. 34a. (Fernandez J., dissenting). Moreover, since Texaco and Shell no longer compete in that business in the United States, who other than Equilon *could* price those products for sale? *Id.*

C. Certiorari Should Be Granted To Consider When Section One Applies To An After-The-Fact Attack On The Formation Or Permissible Scope Of A Joint Venture.

A distribution and marketing joint venture without the ability to price its own goods is a legal oxymoron. It cannot exist, or cannot compete. The respondents' challenge to Equilon's pricing of the gasoline it produces, transports and sells at its gas stations, therefore, is not simply a challenge to a policy decision of an integrated joint venture, it is an attack on one of the *raisons d'etre* of Equilon: to compete as a seller in the downstream gasoline business.

Before Equilon was formed, its proposed operations were subjected to a lengthy review by the FTC and various state Attorneys General. Among other factors, the FTC considered the parents' market shares; the concentration in the market (HHI); barriers to new entry; and other similar factors bearing on the likely effect on competition that might result from formation of the venture. The likelihood that the venture would achieve cost savings and other efficiencies that could benefit

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it would be irrelevant. Negotiating the terms of a joint venture is not price fixing, and it certainly cannot be condemned as *per se* illegal without any consideration of the proposed venture's likely benefits. *See, infra, United States v. Penn-Olin Chem. Co.*, 378 U.S. 158 (1964). In any event, the creation of a distribution and marketing joint venture by definition gives rise to an entity that must price for sale its own goods. This was a foundational aspect of the venture that obviously was before the FTC and state Attorneys General when they reviewed and ultimately approved the formation of Equilon.

consumers also would have been considered. Based on its review, the FTC (joined by certain state Attorneys General) identified a number of areas of competitive concern and then sought and obtained divestitures to remedy overlaps between Shell and Texaco in these markets. *See In The Matter of Shell Oil Company, et al.*, 125 F.T.C. 769, Consent Order (April 21, 1998); *see also* Pet. App. 3a.

The FTC's investigation focused on the actual market effects of the venture, not on the way in which it was going to price its gasoline. Nothing in its Complaint or in the Consent Order resolving the case suggests that the FTC was at all concerned that Equilon would be responsible for all downstream aspects of the sale of gasoline, including the pricing of its gasoline for sale. Presumably that is because the formation of the venture was viewed by the FTC not as an ongoing collaboration among competitors but as a merger of Texaco's and Shell's downstream operations. Single entities are not price fixing when they merely set a sales price for their own goods.

The points noted above are forcefully underscored by respondents' recently-filed Opposition to Petitions for a Writ of Certiorari ("Opposition"). In that Opposition, respondents offer a vociferous attack on the appropriateness of Texaco and Shell being allowed to include joint marketing within their venture. Thus, for example, respondents assert that the two firms were profitable on their own (p. 5), and that no "efficiencies" were created by allowing the venture to market its own production (p. 8). According to respondents, those facts demonstrate that it is *per se* price fixing for the joint venture to agree on the prices to be charged for the gasoline produced by the venture in the United States. *See* Opposition at p. 9.

But that is fundamental *non-sequitur*. Assuming, *arguendo*, that what respondents assert is true, those facts conceivably could

have been grounds for *excluding* the marketing function from the permitted scope of the venture at the time of its formation, or, under appropriate circumstance, for attacking the scope of the venture thereafter. But—and this is the vital point—it is utterly inappropriate to turn an attack upon the formation or scope of a venture into a Section 1 claim by saying that it was a mistake to allow marketing to be included within it.[7]

Yet that is precisely what the Court of Appeals' decision effectively does. Despite the FTC's decision to treat the joint venture as a single entity, the Ninth Circuit majority has now revisited that decision *sub silentio*.[8] Moreover, it has done so without a proper invitation and on an utterly inappropriate

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[7] In a mystifying section of their Opposition, respondents assert that the illicit character of petitioners' behavior is demonstrated by the supposed fact that the owners of the venture, as opposed to "the venture," itself, priced the gasoline which Equilon produced and sold. Opposition at pp. 10-11. But that claim betrays a fundamental misunderstanding of what it *means* to be a joint venture. Who, other than the owners, are in a position to make decisions for the venture? If marketing had been *excluded* from the scope of petitioners' venture, then it unquestionably would be inappropriate for Texaco and Shell to agree (or even confer) about the pricing of their *separate* products. However, the gasoline produced and sold *by the venture* (albeit under two separate licensed trademarks) needed to be priced *by the venture*. The identity of the individuals making that "venture" decision is utterly beside the point.

[8] Respondents' Opposition also repeatedly asserts that the petitions raise questions that were not even before the Court of Appeals. *See* Opposition at, *e.g.*, pp. 1 & 9. But, in fact, the distinction between the approach adopted by the majority and that urged by petitioners is unavoidably central to the proper disposition of this case. In addition, of course, the dissent could not be clearer in drawing a critical distinction between a purported *per se* price-fixing conspiracy and "an entity which now owns all of the production, transportation, research, storage, sales and distribution facilities for engaging in the gasoline business also pric[ing] its own products." Pet. App. 34a.

basis. As we say: *The issue here is not price fixing*. It is the validity and permissible operational activities of the venture. If the respondents wanted to mount an after-the-fact attack on those issues they needed to do so directly and by appropriate means. Specifically, their claim should not be under Section 1 at all (and certainly not as a *per se* unlawful horizontal price-fixing agreement).[9] It should, instead, be a claim that the functional scope of the venture violates Section 7 of the Clayton Act (or, perhaps, Section 2 of the Sherman Act, 15 U.S.C. § 2).

That is a fundamental distinction and one which, *amici* submit, is exceedingly important to observe. Had *that* challenge been raised, the court not only would never have confronted a *per se* price-fixing claim, but it would have needed to carefully analyze the benefits and costs imposed by allowing Shell

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[9] While *amici* submit that this case should have been disposed of under the principles discussed in text (and, of course, by Judge Fernandez in his dissent), there can be no doubt that, at a minimum, this case should have been decided under the rule of reason, not the *per se* rule. Given the draconian consequences of applying a *per se* test, that issue has been the subject of many of this Court's most important antitrust decisions. *See, e.g., Broadcast Music, Inc.*, 441 U.S. 1; *NCAA*, 468 U.S. 85; *California Dental Ass'n v. Federal Trade Commission*, 526 U.S. 756 (1999); *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977). Even if an attack upon the operational scope of a venture were "fair game" under Section 1, the venturers surely were entitled to defend the efficiency of including the marketing function (and, of necessity, pricing of the products to be marketed) as an "ancillary restraint" reasonably necessary to make their venture more efficient. *See United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 282 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986). As petitioner Texaco explains, this error, itself, is ample grounds for granting review in light of the clear conflict between the decision in this case and other contrary circuit court cases resolved under the rule of reason. *See* Texaco's petition at pp. 7-13; *see also* Shell's petition at pp. 13-15.

and Texaco to include marketing as a part of their venture as well as various other issues that are presented when a court is asked, after the fact, to decree what amounts to partial divestiture of a previously consummated merger. *See* V P. Areeda and H. Hovenkamp, *Antitrust Law* ¶1205, 296 (2d ed. 2003). Moreover, the usual burdens would apply, and respondents would have had to prove competitive harm. Under the Ninth Circuit's approach, that burden was shifted to the petitioners, who purportedly were unable to "offer any explanation of how their unified pricing of the distinct Texaco and Shell brands of gasoline served to further the ventures' legitimate efforts to produce better products or capitalize on efficiencies." Pet. App. 23a.

Amici have a strong intuition about how such a claim would have been resolved, had it been made. (Indeed, the very fact that it was not made, and that respondents chose, instead, to rest their case solely on a misplaced *per se* price-fixing theory strongly suggests that respondents share that intuition.) But that is not the point. The point is that allowing what should be only a challenge to formation and scope issues to be analyzed as *per se* price fixing when a venture sets the price of its products is fundamentally misdirected as a matter of antitrust policy towards joint ventures. It is a mistake that, we respectfully submit, calls out for correction by this Court.

D. Certiorari Should Be Granted To Provide Business With Needed Guidance Regarding The Applicability Of Section 1 To Joint Ventures.

Because of the prevalence of joint ventures and the exceeding importance of "defining the bounds of acceptable cooperation between direct rivals," *see In re Polygram Holding, Inc.*, *supra*, the Court should take this opportunity to give lower courts guidance regarding the proper way to address and analyze joint venture issues. As counsel for the respec-

tive petitioners have aptly noted, there is a clear division of approaches among the lower courts, including the circumstances under which a venture should be regarded as a single entity within the meaning of Section 1 and *Copperweld*.[10] However, *amici* submit that, unlike the ordinary case in which lower courts have reached divergent conclusions with respect to a discrete issue of law, the conflicts in approach reflected in the present petitions demonstrate a far more important and fundamental conflict which is central to the viability of the joint venture as a co-equal form of industrial organization—a matter which, because of its implications for American commerce, speaks with unusual force in favor of review.

While this Court has dealt with discrete "joint venture" issues in a number of prior important cases, it has not directly addressed the appropriate structure for analyzing joint ventures as such. The closest that it came to doing so was its decision in *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, holding that joint ventures are subject to analysis under Section 7 of the Clayton Act. Additionally, in *Copperweld*, this Court acknowledged, in passing, that joint venture conduct frequently lies in something of an antitrust netherworld between single-firm activity and horizontal combination and that rule of reason analysis typically will apply for that reason. However, that unexplicated assertion—while itself entirely at odds with the approach taken by the Ninth Circuit in this case—plainly was not intended to be a definitive assessment of the single entity issue as applied to joint ventures (a matter which was not remotely presented in *Copperweld*). Rather, the Court's brief *dicta* in that case should be taken as an acknowledgement that there is a fundamental issue of characterization (and, hence, of potential antitrust liability *vel non*) in cases involving joint ventures which is every bit as

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[10] *See, e.g.*, Shell's petition at pp. 10-13.

important in commercial terms as the parent-subsidiary question decided in *Copperweld*. That issue—when Section 1 applies to a joint venture—remains, and plainly needs to be decided.[11]

There is a second sense in which this case fairly invites the attention of this Court. Perhaps uniquely, American antitrust law is a creature of judicial, as opposed to legislative, creation. Not only is the language of the Sherman and Clayton Acts exceedingly general in critical respects, those statutes—as this Court, on several occasions, has observed—cannot even mean what they say.[12] Thus, without careful judicial cabining they likely would be unconstitutionally void for vagueness. *But see Nash v. United States*, 229 U.S. 373, 376-78 (1913) (upholding criminal conviction under rule of reason). Yet they are the fundamental engines through which the largest economy in the world regulates competition. Moreover, unlike most other industrialized countries, much of that regulation comes through litigation, often instituted by private parties before courts which are presided over by judges with no special training in industrial organization economics. Given this unique situation, *amici* respectfully suggest that the usual presumptions against review—so necessary to manage a docket overflowing

[11] Prior to *Copperweld*, Chief Justice Rehnquist had dissented from denial of certiorari in a joint venture case involving the *National Football League* on the ground that the league should have been treated as a single entity *NFL v. North Am. Soccer League*, 459 U.S. 1074, 1077 (1982) (Rehnquist, J., dissenting from denial of cert.) ("the league competes as a unit against other forms of entertainment").

[12] *See Nat'l Soc. of Professional Engineers v. United States*, 435 U.S. 679, 687 (1978) ("One problem presented by the language of § 1 of the Sherman Act is that it cannot mean what it says."); *see also Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 531-32 (1983); *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918); *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911).

with urgent requests for hearing—needs to be tempered by consideration of the unique judicial function in antitrust cases.

As noted previously, the Court has not spoken in definitive terms regarding the proper application of the Sherman Act to joint ventures, including specifically the circumstances under which some form of "single entity" principle applies, thereby foreclosing a Section 1 challenge altogether. In light of the unquestioned importance of joint ventures and the need for both legal counselors and courts confronting joint venture cases to be able to provide clear guidance and render consistent, predictable decisions, *amici* respectfully submit that review here would be appropriate.[13]

CONCLUSION

For the foregoing reasons, the petitions for writ of certiorari should be granted.

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[13] At a minimum, this Court should seek the views of the Solicitor General on whether to grant certiorari. This case is unlike the situation in cases like *3M Co. v. LePage's, Inc.*, 124 S.Ct. 2932 (2004) in which the Solicitor General, upon invitation, urged the Court to deny certiorari despite the government's acknowledgement of apparent error, so that the issue (there, "bundled pricing") could benefit from further judicial development in subsequent cases. Here, the issue is fully framed and the conflict in approach starkly presented by the majority and dissenting opinions, respectively.